84-540 No.

Office - Supreme Court, U.S
FILED
OCT 1 1984

In The

Supreme Court of the United States

OCTOBER TERM, 1984

RONALD BOOTH,

Respondent,

-vs-

TOWNSHIP OF WINSLOW, A Municipal Corporation, GARY F. STOWELL, SR., Chief of Police, Township of Winslow, DOMINIC MAIESE, Mayor and Public Safety Director, Township of Winslow,

Petitioners,

and

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

MARESSA, GOLDSTEIN, BIRSNER, PATTERSON & DRINKWATER
191 White Horse Pike
Berlin, New Jersey 08009
(609) 767-1471

Attorneys for Petitioners

BENJAMIN GOLDSTEIN, ESQ.
Of Counsel and on the Petition

THE SUPERIOR APPELLATE PRINTING COMPANY
P.O. Box 363 Area Code 609
Cranbury, N.J. 08512 443-4202

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QUESTION PRESENTED

1. Are police officers afforded preferential treatment in New Jersey under N.J.S.A. *40A:14-122.1* which prohibits a municipality from enacting any rule or ordinance which would require members of a police force to be residents of the municipality where they were employed, and is said statute thus unconstitutional under the *United States Constitution, Amendment XI, Section 1*,as a violation of equal protection of law in light of *N.J.S.A. 40A:9-1.3* which was enacted six years later and which provides that the governing body of any local unit, could, by ordinance, require all officers and employees, employed by the local unit, to be bona fide residents of the local unit, and in light of this Court's Opinion in *McCarthy v. Philadelphia Civil Service Commission, 42 U.S. 645 (1976)*, which held that a municipal ordinance requiring employees of the city to be residents of the city during the time that they are employed does not violate constitutionally protected rights of interstate travel, and that an ordinance requiring employees such as police to reside within the city was not irrational, and served a legitimate governmental purpose?

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TOWNSHIP OF WINSLOW, A Municipal Corporation, GARY F. STOWELL, SR., Chief of Police, Township of Winslow, DOMINIC MAIESE, Mayor and Public Safety Director, Township of Winslow,

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and

STATE OF NEW JERSEY,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

TOWNSHI OF WINSLOW, A Municipal Corporation, GARY F. STOWELL, SR., Chief of Police, Township of Winslow, DOMINIC MAIESE, Mayor and Public Safety Director, Township of Winslow, the Petitioners herein, pray that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above-titled case on July 3, 1984.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is printed in Appendix C hereto, infra, page 27a. The written opinion of the Superior Court of New Jersey, Appellate Division, Docket No. A-2467-82-T2, decided March 15, 1984, is printed in Appendix B hereto, infra, page 21a. The written opinion of the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-68096-79, dated 12/14/82 is printed in Appendix A hereto, infra, page 1a.

JURISDICTION

The judgment of the Supreme Court of New Jersey (Appendix C, infra, page 27a) was entered on July 3, 1984. The jurisdiction of the Court is invoked under *28 U.S.C. §1257 (3)*.

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STATUTES INVOLVED

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. [Citizenship - Due process of law - Equal Protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.J.S.A. 40A:14-122.1

40A:14-122.1. Residency As Condition of Employment.

No municipality shall pass any ordinance, resolution, rule, regulation , order or directive, making residency therein a condition of employment for the purpose of original appointment, continued employment, promotion, or for any other purpose for any member of a police department and force and any such ordinance, resolution, rule, regulation, order or directive in existence on the effective date of this act or passed hereafter shall be void and have no force or effect.

N.J.S.A. 40A:14-123.1a

40A:14-123.1a. Classification of applicants; appointment.

a. In any municipality of this State, before any person shall be appointed as a member of the police department and force, the appointing authority may classify all the duly qualified applicants for the position or positions to be filled in the following classses:

I. Residents of the municipality.
II. Other residents of the county in which the municipality is situate.
III. Other residents of the state.
IV. All other qualified applicants.

Within each such classification duly qualified applicants who are veterans shall be accorded all such veterans' preferences as are provided by law. Persons discharged from the service within 6 months

prior to making application to such municipality who fulfill the requirements of *N.J.S.A. 40A:14-123.1*, and who, thereby, are entitled to appointment notwithstanding their failure to meet the New Jersey residency requirement at the time of their initial application, shall be placed in Class III.

b. In any municipality which classifies qualified applicants pursuant to subsection a. of this section, the appointing authority shall first appoint all those in Class I and then those in each succeeding class in the order above listed, and shall appoint a person or persons in any such class only to a vacancy or vacancies remaining after all qualified applicants in the preceding class or classes have been appointed or have declined an offer of appointment.

c. In any such municipality operating under the provisions of *Title* 11 of the Revised Statutes, the classes of qualified applicants defined in subsection a. of this section shall be considered as separate and successive lists of eligibles, and the Civil Service Commission shall, when requested to certify eligibles for positions specified in this section, make such certifications from said classes spearately and successively, and shall certify no persons from any such class until all persons in the preceding class or classes have been appointed or have declined offers of appointment.

d. This section shall apply only to initial appointments and not to promotional appointments of persons already members of the police department.

e. In making temporary appointments the appointing authority may utilize the classifications set forth in subsection a. of this section, and shall classify accordingly all duly qualified applicants for the positions to be temporarily filled.

N.J.S.A. 40A:9-1.3

40A:9-1.3. Residency requirement; bona fide resident; copy of ordinance or resolution transmitted to civil service.

Unless otherwise provided by law, the governing body of any local unit may by resolution or ordinance, as appropriate, require, subject to the provisions of this act *[40A:9-1.3 to 40A:9-1.10*, effective June 30, 1978], all officers and employees employed by the local unit after the effective date of this act to be bona fide residents therein. A bona fide resident for the purpose of this act is a person having a permanent domicile within the local unit and one which has not

been adopted with the intention of again taking up or claiming a previous residence acquired outside of the local unit's boundaries. Any local unit wherein the provisions of *Title 11* (Civil Service) of the Revised Statutes are operative, shall transmit a copy of the adopting ordinance or resolution, as the case may be, to the Civil Service Commission.

N.J.S.A 40A:14-9.1

40A:14-9.1. Requirement of residency in municipality; prohibition.

No municipality shall pass any ordinance, resolution, rule, regulation, order or directive, making residency therein a condition of employment for the purpose of original appointment, continued employment, promotion, or for any other purpose for any member of a paid fire department and force or paid member of a part-paid fire department and force, and any such ordinance, resolution, rule, regulation, order or directive in existence on the effective date of this act or passed hereafter shall be void and have no force or effect.

WINSLOW TOWNSHIP ORDINANCE
Number 0-22-77

0-22-77. All municipal officers and employees, other than those exempt by statute, now in the employ or hereafter to be employed by the Township of Winslow are hereby required as a condition of their continued employment to have a place of abode in the Township of Winslow and to be bona fide residents therein. Those persons presently employed by the Township of Winslow who do not reside in said Township shall have two (2) years from the effective date of this ordinance to become bona fide residents of the Township. (Titles omitted).

STATEMENT

On February 15, 1972, *N.J.S.A. 40A:14-122.1* became law, which prohibited a municipality from enacting any rule or ordinance which would require members of a police force to be residents of the municipality where they were employed. A parallel prohibition on residency requirements for firefighters is set forth in *N.J.S.A. 40A:14-9.1.*

On June 30, 1978, *N.J.S.A. 40A:9.1-3* became effective, and this statute provided that the governing body of any local unit, could by ordinance, require all officers and employees, employed by the local unit, to be bona fide residents of the local unit.

The co-existence of *N.J.S.A. 40A:9.1-3, N.J.S.A. 40A:14-122.1, and N.J.S.A. 40A:14-9.1* results in disparate treatment between municipal police and firemen and all other municipal employees.

On or about April 17, 1975, the plaintiff was hired as a police officer by Winslow Township. On or about September 28, 1977, defendant Township enacted Ordinance No. 0-22-77 requiring all municipal officers and employees to reside in the Township as a condition of employment.

Plaintiff was notified of the Ordinance and did move into the Township for a brief period of time. Thereafter, plaintiff moved out of the Township in spite of the Ordinance.

After giving plaintiff a "grace period" to again comply with the Ordinance, plaintiff was terminated on or about March 7, 1980 for non-compliance with the Ordinance.

Plaintiff has filed suit against the Township, the Chief of Police, and the Mayor alleging that the residency Ordinance is invalid as applied to him pursuant to *N.J.S.A. 40A:14-122.1* and that the Ordinance was enacted maliciously by the Township.

Petitioners herein filed a Motion for Sumary Judgment with the trial court seeking to have *N.J.S.A. 40A:14-122.1* declared unconstitutional on equal protection grounds. After Briefs and argument to the Law Division and after notice to the Attorney General pursuant to *N.J.C.R. 4:28-4 (a)*, the trial court issued its written opinion in favor of Petitioners and holding *N.J.S.A. 40A:14-122.1* unconstitutional. (Appendix D, page 28a).

Plaintiff appealed to the Appellate Division which reversed the Law Division in its opinion decided March 15, 1984 (Appendix B, page 21a).

On or about April 2, 1984, Petitioners filed a Notice of Appeal to the New Jersey Supreme Court pursuant to the New Jersey Court Rule and, at the same time, filed a Notice of Petition for Certification, as an alternative, in the event the matter was held not to be appealable as of right.

The New Jersey Supreme Court entered its Order on July 3, 1984, denying Petitioners Certification and refusing to hear the matter.

Since Petitioners herein allege a violation of the *United States Constitution, Amendment XIV* regarding equal protection of laws, this Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THIS WRIT

This Court has at least twice upheld residency requirements for police officers only. *McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976); Detroit Police Officers Association v. City of Detroit, 405 U.S. 950 (1972)* (appeal dismissed for want of significant federal question). The justifications underlying them have long been recognized as particularly compelling when applied to police officers. *D.P.O.A. v. Detroit, supra, 385 Mich. 519, 190 N.W.2d 97 (1971); Krzewinski v. Kugler, 338 F.Supp. 492 (DNJ 1972).* As the Chancery Division in New Jersey noted in *Trainor v. City of Newark, 137 N.J.Super. 570, 350 A2d 83 (1975),* a residency requirement affecting *only* the police would probably be upheld, but one *excepting* only the police is hard to rationalize.

In order to be valid legislation and to withstand a constitutional challenge, the statute must meet either the "rational basis" test or the "compelling state interest" test as articulated by the New Jersey Court in *Trainor, supra. N.J.S.A. 40A:14-122.1* cannot withstand either.

A. The "Rational Basis" Test

To be valid under the "rational basis" test, a classification must meet a two-part test: is there a legitimate governmental purpose for it, and could a legislature reasonably have believed that establishment of that classification would promote that purpose. *Western & Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648 (1981).* There must be a relationship between the classification and the end sought to be achieved. As this Court has noted in a different context:

> Of course, if upon examination it becomes clear that there is no substantial relationship between the statutes and their purported objectives, this may well indicate that these objectives were not the statutes' goals in the first place.1

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1 Orr v. Orr, 440 U.S. 268 at 280 (1979)

The justifications for residency requirements, the objectives which a police exemption must somehow be found to support, were listed by the Supreme Court of California as follows:

> Among the governmental purposes cited in these decisions or now urged by amici curiae are the promotion of ethnic balance in the community; reduction in high unemployment rates of inner-city minority groups; improvement of relations between such groups and city employees; enhancement of the quality of employee performance by greater personal knowledge of the city's conditions and by a feeling of greater personal stake in the city's progress; diminution of absenteeism and tardiness among municipal personnel; ready availability of trained manpower in emergency situations; and the general economic benefits flowing from local expenditure of employees' salaries. We cannot say that one or more of these goals is not a legitimate state purpose rationally promoted by the municipal employee residence requirement here in issue.
>
> *Ector v. City of Torrance, 10 Cal. 3d 129 at 139, 109 Cal. Rptr. 849 at 852, 514 P2d 433 (1974); cert.den. 415 U.S. 935 (1974)*

As the Court then reasoned in *Trainor, supra*, none of these goals is promoted by exempting police and fire personnel from general residency requirements.

B. The "Compelling State Interest" Test

It should first be noted that there is a need for uniformity in the employment of municipal employees.

The courts have classified police under the "officer" status as described in *N.J.S.A. 40A:9-1.3*. In the case of *Mercadante v. City of Patterson, 111 N.J.Super. 35, 266 A2d 611 (Chan.Div.1970)*, the Court held that policemen are municipal officers. Since under *N.J.S.A. 40A:9-1.3* municipalities have the freedom to enact ordinances requiring municipal officers and employees to reside within that municipality, so too should this apply to police officers. Such would

make a uniform residency requirement of all municipal employees, and as a result, all employees would be treated equally and fairly.

The courts have at various times upheld the validity and need for residency requirements for City and County employees. As noted, this Court in *McCarthy v. Philadelphia Civil Service Commission, 42 U.S. 645 (1976)*, stated that a municipal ordinance requiring employees of the city to be residents of the city during the time that they are employed does not violate constitutionally protected rights of interstate travel, and that an ordinance requiring employees such as police to reside within the city was not irrational.

That view was echoed by the New Jersey Courts. In *Mercadante v. Patterson, 111 N.J.Super. 35, 266 A2d 611 (1970)*, the Superior Court of New Jersey held that residence requirements for governmental employment, whether at the State, County or municipal level and whether imposed by statute or ordinance, is constitutional. And in *Skolski v. Woodcock, 149 N.J. Super. 340, 373 A2d 1008 (1977)*, the Court held that residency requirements were constitutional as being in furtherance of the public welfare.

Not only are residency requirements regarding policemen constitutional, they are also necessary to better implement the law enforcement process. As the New Jersey Supreme Court stated in *Kennedy v. City of Newark, 29 N.J. 178, 148 A2d 473 (1959)*, "If there is a rational basis for a residence requirement in furtherance of the public welfare, the Constitutional issue must be resolved in favor of the legislative power to ordain it." *148 A2d at 476.*

In the case of a police officer, a residency requirement is even more imperative to further the public welfare than any other municipal employee. In *Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972)*, the Court pointed out that a statute requiring police and firemen to be residents of the municipality where they are employed, thereby requiring policemen or firemen to surrender their constitutional rights to travel and migrate in exchange for their job, was justified by compelling state interests in promoting identity with the community among police and firemen, in deterring crime by presence of off-duty police in the municipality and in resulting chance associations and encounters which might lead to invaluable sources of information, developing community rapport and putting an end to misunderstanding and intolerance.

Thus, the Courts have upheld under the compelling state interest test, the enforcement and existence of a residency requirement for policemen but not the existence of an exemption to the requirement.

C. Denial of Equal Protection

Finally, it should be noted that other law enforcement personnel operating on the County and State levels in New Jersey are subject to residency requirements. County detectives, investigators and assistant prosecutors must reside within the County in which they are employed. Both *Mandelbaum v. State Department of Civil Service, 142 N.J. Super. 323, 361 A2d 560 (App. Div. 1976)* and *Humphreys v. Passaic County Board of Chosen Freeholders, 159 N.J. Super. 258, 387 A2d 1219 (App. Div. 1978)* upheld the statute *(N.J.S.A. 11:22-7)* requiring County detectives, investigators and assistant prosecutors to be residents of the County in which they worked. The same reasons compelling County prosecutors, etc., to reside in the County they work in, should likewise be applied to municipal police officers. All are law enforcement officers who need to be easily accessible to their offices and areas of employment in order to best and most efficiently carry out their duties, and as such, there can be no compelling state interest in a residency exemption statute only for policemen.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

s/B.G.

BENJAMIN GOLDSTEIN, ESQ.
Counsel for Petitioners
191 White Horse Pike
Berlin, New Jersey 08103

Appendix

APPENDIX A

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAMDEN COUNTY
DOCKET NO. L-70962-79

RONALD BOOTH,
Plaintiff
v.
TOWNSHIP OF WINSLOW,
A MUNICIPAL CORPORATION,
GARY F. STOWELL, SR., AS
CHIEF OF POLICE OF TOWNSHIP
OF WINSLOW, DOMINIC MAIESE,
AS MAYOR AND DIRECTOR OF PUBLIC
SAFETY OF TOWNSHIP OF WINSLOW,
Defendants.

Decided December 14, 1982
Thomas F. McGuire for plaintiff.
Benjamin F. Goldstein for defendants.

DAVIS, J.S.C.

This matter has been brought to the attention of this court by the defendant Township of Winslow (Township) filing its motion for summary judgment. All other defendants named joined in the motion.

The motion seeks to have *N.J.S.A. 40A:14-122.1* declared unconstitutional on federal protection grounds. The statute, which was enacted in 1972, states that

> No municipality shall pass any ordinance, resolution, rule, regulation, order or directive, making residency therein a condition of employment for the purpose of original appointment, continued appointment promotion, or for any other purpose for any member of a police department and force and any such ordinance, resolution, rule, regulation, order or directive in existence on the effective date of this act or

passed hereafter shall be void and have no force or effect.

A legitimate frontal or direct attack against the statute on equal protection grounds has not been previously presented to our courts as far as diligent research can ascertain. Before resolving the constitutional issue, several important threshold questions must be resolved. First, it must be determined whether the defendant Township has "standing" to assert an equal protection defense in a private citizen's complaint which sets forth a non-constitutional claim and, secondly, whether there is standing to raise this defense on behalf of others, e.g. the Township employees, the other defendants herein.

The Township has standing to raise the constitutional objections of its employees against a state statute which directly affects the municipality and thereby impairs the employees' right to equal protection under the Fourteenth Amendment. The privilege granted to police officers under *N.J.S.A 40A:14-122.1* is violative of those rights given to citizens in the equal protection clause of the Fourteenth Amendment of the United States Constitution.

FACTUAL BACKGROUND

The facts involved in this litigation are not in dispute. On or about April 17, 1975, plaintiff was hired as a police officer by defendant, Township of Winslow. Plaintiff was not a resident of Winslow Township at that time. On or about September 28, 1977, defendant Township enacted Ordinance No. 0-22-77 requiring all municipal officers and employees to reside in the township as a condition of employment.

> All municipal officers and employees, other than those exempt by statute, now in the employ or hereafter to be employed by the Township of Winslow are hereby required as a condition of their continued employment to have a place of abode in the Township of Winslow and to be bona fide residents therein.
>
> Those persons presently employed by the Township of Winslow who do not reside in said Township shall have two (2) years from the effective date of this ordinance to become bona fide residents of the Township. (Titles omitted)

The plaintiff temporarily resided in Winslow Township from June, 1979 to December, 1979. At all other times before and after this period, plaintiff has resided outside the Township. On March 7, 1980, the defendant Township terminated plaintiff's employment with its police department for the sole reason that plaintiff failed to comply with the residency ordinance by failing to establish a bona fide residence in the Township.

The plaintiff brought this action seeking reinstatement as a police officer, back wages, benefits and other damages. Plaintiff alleges that the termination of his employment under the defendant's residency ordinance is illegal and void under *N.J.S.A. 40A:14-122.1* which prohibits the enactment by any municipality of any ordinance requiring police officers to be residents of the municipality.

The defendant's motion for summary judgment is based upon the argument that since *N.J.S.A. 40A:14-122.1* is unconstitutional, it has no effect on the Township's ability to interpret and implement its residency ordinance to justify the termination of plaintiff's employment under the ordinance. The propriety of the defendants' termination of plaintiff's employment hinges upon the validity of *N.J.S.A. 40A:14-122.1*.

STATUTORY HISTORY

A brief excursion through the labyrinth of statutory enactments, amendments and repeals will more clearly set forth the stage for the resolution of the several issues before the court.

Historically, as a condition of employment, the legislature has generally required officers of a county or local municipality to be residents of that political subdivision. *N.J.S.A. 40:11-1*. Likewise, our courts have traditionally held that policemen and firemen are subject to these residency requirements, whether said requirements are at the state, county or municipal level or whether imposed by statute or ordinance. Our courts have also held such requirements constitutional. *Mercadante v. The City of Paterson, 111 N.J. Super. 35, (Chan. Div. 1970)*.

In 1971, *N.J.S.A. 40A:9-1* was enacted to replace *N.J.S.A. 40:11-1*. By way of several amendments in 1974, 1975 and 1977, *N.J.S.A. 40A:9-1* excluded various positions from the stricture of residency. The excluded positions were county administrators, counsel, engineers, health officers, auditors, comptrollers and assessors and collectors of taxes.

In 1972, as previously mentioned, the statute in question, *N.J.S.A. 40A:14-122.1* was enacted and totally prohibited local governments from mandating residency requirements for policemen. In 1978, *N.J.S.A. 40A:9-1*, which set up the exception mentioned, was repealed by the enactment of *N.J.S.A. 40A:9-1.3* which in pertinent part reads as follows:

> Unless otherwise provided by law, the governing body of any local unit may be resolution or ordinance, as appropriate, require, subject to the provisions of this act, all officers and employees employed by the local unit after the effective date of this act to be bona fide residents therein. (Emphasis supplied).

This repealer, however, did not affect the exclusions given to policemen. In 1976, some relief was given to local governments by the enactment of *N.J.S.A. 40A:14-122.4*. This statute applies to those governments wherein Civil Service was operative. It allows a local government to give preference to a resident if the examination score of the non-resident is equal to that of the resident. The relief seems to be illusory since continued employment may not be mandated.

The Township, in direct contravention of *N.J.S.A. 40A:14-122.1*, enacted its residency ordinance in 1977 and interprets it to include police officers within its scope. There being no dispute as to any material issue of fact and there being no other way to avoid the constitutional issue, it is appropriate for the court to decide the motion. After appropriate invitation under *R.4:28-4*, the Attorney General has decided at this posture of the case not to participate.

STANDING OF A MUNICIPALITY TO CONTEST THE VALIDITY OF A STATE STATUTE ON FEDERAL CONSTITUTIONAL GROUNDS

The plaintiff contests the defendants' summary judgment motion primarily on the ground that the defendant, Township, and the individual defendants sued in their official capacity do not have

standing to contest the validity of a state statute on federal constitutional grounds.[1] The issue of the defendants' standing to raise the federal constitutional objection to the state statute must be divided and analyzed in two distinct parts because of the procedural positions of the parties to the litigation. The first inquiry is whether the Township can raise federal constitutional defenses to contest the validity of a state statute in a suit brought against the Township by a private citizen on a nonconstitutional claim. The second inquiry is whether the Township has proper standing to assert the federal constitutional claim of its employees against the validity of a state statute which impacts directly upon the municipality but affects the employees' constitutional rights.

The absolute power of a state over its municipalities is well established. The classic statement of the relationship between a state and its municipalities was set forth by the United States Supreme Court in *Trenton v. New Jersey, 262 U.S. 182 (1923).*

> In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. *Id. at 187* (footnote omitted)

The United States Supreme Court has long held that the power of the state to control its municipalities is not restricted by the Due Process or Equal Protection clauses of the Fourteenth Amendment. *Williams v. Baltimore, 289 U.S. 36 (1933).* Therefore, municipalities have traditionally been considered to be without "standing" to assert federal constitutional claims against the state. *Camden County v. Pennsauken Sewerage Authority, 15 N.J. 456, 105 A.2d. 505 (1954).*

The concept of "standing" at the time of the *Williams v. Baltimore, supra,* has undergone extensive changes in arriving at the modern concept of "standing to sue". At the time of the *Williams* decision, a party's standing was determined under a "legal interests test" which

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1. The individual defendants have not raised any separate defenses on their own behalf. The court has decided this motion soley on the federal constitutional issue raised by all of the defendants in their official capacity.

has been eroded by subsequent United States Supreme Court decisions, e.g. *Board of Education v. Allen, 392 U.S. 236 (1968) (88 Sup. Ct. 1923)* (school board had standing to challenge state law under First and Fourteenth Amendments; *Flast v. Cohen, 392 U.S. 83 (1969)* (taxpayer had standing to contest federal statute if able to show constitutionally affected by provision in manner distinguishable from other taxpayers).

The proper inquiry in determining whether one has standing under modern decisions is a "case or controversy" test.[2] The proper focus of the inquiry is whether the parties have "alleged such a personal stake in the outcome of the controversy to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions". *Baker v. Carr, 82 Sup. Ct. 691, 186, 703 (1962).* The Township of Winslow clearly has a "personal stake" in contesting the validity of a statute prohibiting the Township from implementing its residency ordinance in a manner requiring plaintiff and other police officers to be residents of the Township as a condition of employment. The Township is adversely affected by the state statute because it is prevented from implementing its residency requirement in a manner consistent with its underlying purposes and the equal protection rights of its employees and officers.

The United States Supreme Court indicated in *Board of Education v. Allen, supra,* that municipal authorities had standing to challenge the constitutionality of a state law they believed would force them to breach their duty to uphold the Constitution. The Township and its officers similarly assert that the state statute barring the application of its residency ordinance to its police officers forces the defendants to violate the equal protection rights of the non-exempt officers and employees. Therefore, the defendants have shown that they have a sufficient stake in the outcome of the federal constitutional issue to meet the general requirements for standing.

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2. While the "case conroversy" requirement of Article III of the United States Constitution is not required in the courts of New Jersey, *N.J. Const. (1947), Art. VI §, par. 1;* in the event reviewed by the United States Supreme Court is sought on the federal constitutional issue, it will save judicial resources to make sure there is proper Article Three standing so the United States Supreme Court will not dismiss the appeal for lack of standing to raise the federal question. *Bonnet v. State, 171 N.J. Super. 177, 198 (Law Div. 1976), aff'd 155 N.J. Super. 520 (App. Div. 1978).*

Courts in New Jersey and other jurisdictions have carved out exceptions to the general rule of *Williams v. Baltimore, supra,* barring municipalities from contesting the validity of state statutes. In *Kennedy v. East Brunswick Twp., 172 N.J. Super. 45 (App. Div. 1980),* a municipality was entitled to contest the validity of a statute requiring it to expend public funds in a suit by police officers to recover benefits allegedly due to them for their service in other departments. The court struck down a state statute allowing only employees of counties of the first and second class to be entitled to benefits and credit for prior service in other municipalities as special legislation because it excluded employees of counties of the third through sixth classes. The court was careful in sustaining the municipality's standing to limit its holding to the contesting of statutes which require the municipality to expend public funds. *Id. at 50.*

In Bonnet v . State, supra, a municipality had standing to contest the state system of imposing real property taxes as a violation of equal protection and due process because the municipality had title to 26 percent of the taxable real estate in the municipality. The court held that this municipality had the same standing as any other taxpayer actively engaged in real estate. The court denied standing to other municipalities that did not have such extensive real estate holdings. *Id. at 205-206.* The court reasoned that the property holding municipality alleged a sufficient stake to have standing because the effect of the contested system was to deprive the municipality of the ability to effectively function as a local government with the ability to resell real estate within a reasonable time. *Ibid.*

Some courts recognize an exception to the general bar against a municipality contesting the validity of state statutes when the municipality can show that it is presenting a question of great public interest, e.g., *Neeland v. Clearwater Memorial Hospital, 257 N.W.2d. 366 (Minn. Sup. Ct. 1977). Madison v. Ayers, 85 Wis.2d. 540, 271 N.W.2d. 101 (Sup. Ct. 1978).* In *Minnesota State Bd. of Health v. Brainerd, 241 N.W.2d. 624 (Minn. Sup. Ct. 1976), app. dism'd, 429 U.S. 803 (1976),* a city was held to have standing to challenge the constitutionality of a state water fluoridation law because it met the public interest exception to the bar against municipality standing. The court found that the city had a substantial public interest in providing safe water to its citizens. It also found that the implementation of the statute adversely affected the city by threatening to destroy its

filtration system. The Township in the instant case also raises a question of great public importance regarding its ability to legislate in a manner consistent with the best interests of its residents. The defendant, its citizens and other municipalities in New Jersey have a great interest in having their police officers be part of the community; it is their duty to protect the community. *Krzewinski v. Kugler, 338 F. Supp. 492 (D. N.J. 1972). Kennedy v. Newark, 29 N.J. 178, 148 A.2d 473 (1959).* The Township is attempting to implement an ordinance which is consistent with this interest but is being thwarted by a state statute that both the Township and the courts consider to be of questionable constitutional validity. See, *Abrahams v. Civ. Ser. Comm., 65 N.J. 61, 319 A.2d. 483 (1974). Trainor v. Newark, 137 N.J. Super. 570, 380 A.2d. 83 (Ch. Div. 1975), rev'd 145 N.J. Super. 466, 368 A.2d. 381 (App. Div. 1976), Supp. on other grounds, 148 N.J. Super., 434, 372 A.2d. 1132 (1977).* The court should decide this important issue affecting the public interest when it has been clearly presented as in this case.

The exception to the general bar to municipality standing most applicable to this case is that which allows a municipal defendant to raise a federal constitutional defense contesting the validity of a state statute when it is faced with a suit by a private citizen based upon non-constitutional grounds, e.g., *Berlin v. Santiaguida, 181 Conn. 421, 435 A.2d. 980 (Supp. Ct. 1980). State v. Lyndon Station, 98 Wis.2d. 229, 295 N.W.2d. 818 (App. Div. 1980) aff'd 101 Wis.2d. 472, 305 N.W.2d. 89 (Sup. Ct. 1981).* In *Ducharme v. Putnam, 161 Conn. 135, 285 A.2d. 318 (Sup. Ct. 1971),* the defendant municipality was sued by one of its police officers for workmen's compensation benefits. The municipal defendant attempted to present evidence that the plaintiff's coronary occlusion and resulting anterior myocardial infarction did not result from his employment by the municipal defendant. The municipality was barred from offering this evidence by a state statute creating a conclusive presumption that a police officer or fireman who passed his original examination and later suffered injuries caused by hypertension or heart disease suffered those injuries in the course of his employment.

The municipality challenged the validity of the state statutory presumption on due process and equal protection grounds. The Connecticut Supreme Court held that the municipal defendant had standing to contest the constitutionality of the state statute. The court reasoned that with the change in the emphasis for standing from a "legal

interest'' test to one of ''case or controversy'', the standing requirements of *Williams v. Baltimore, supra* were largely eroded. The court concluded:

> Here, the municipality, although a creation of the state government, is in disagreement with the state legislature about the interpretation of the constitution. It is a party which is adversely affected by the contested legislation and is properly in court on nonconstitutional questions. In the absence of some overriding reason which we do not find, such as the existence of a more appropriate party to raise the question or a statute prohibiting municipalities from litigating constitutional issues, it would be an abdication of judicial responsibility for this court, having before it a controversy between a municipality and another party and having been apprised of the asserted consitutional infirmity in a legislative act, adversely affecting the interests of the municipality and its inhabitants, to adjucate only the nonconstitutional questions when the latter may not be dispositive of the basic dispute. *Id. 285 A.2d at 320.*

The Connecticut Supreme Court upheld and applied this reasoning again in Connecticut Light and Power Co. v. Norwalk, 179 Conn. 111, 425 A.2d 576 (Sup. Ct. 1979). In this case the plaintiff utility comany sued the defendant city for illegally refusing to exempt plaintiff from local taxation. The court upheld the defendant municipality's standing to raise the defense of the unconstitutionality of the state procedures granting tax exemption to public utilities on due process grounds.

The reasoning applied in the above two cases by the Connecticut Supreme Court is applicable to the case presently before this court. The Township was brought into court by a private plaintiff in a suit for money damages and reinstatement of employment on the grounds that the defendant illegally refused to exempt plaintiff from the application of defendant's residency requirement. The Township raises the unconstitutionality of the state statute as a defense to plaintiff's suit. It would be an abdication of this court's judicial responsibility to alow the important issue of the validity of the state-provided exemption of police officers from local residency requirements to elude

the courts as it has in the past. See *Trainer v. Newark, supra* (dealing with the corresponding exemption of firemen) and *Mandelbaum v. State Dept. of Civil Service, 142 N.J. Super. 323, 261 A.2d. 560 (App. Div. 1976).*

MUNICIPAL DEFENDANT'S ABILITY TO RAISE A FEDERAL CONSTITUTIONAL ATTACK ON A STATE STATUTE DIRECTLY AFFECTING THE DEFENDANT ON THE GROUNDS THAT THE STATUTE VIOLATES THE EQUAL PROTECTION RIGHTS OF THE DEFENDANT'S EMPLOYEES

Even though it is proper for the municipal defendant to raise a federal constitutional challenge to the state statute, this does not completely dispose of the standing issue. The defendant, Township of Winslow, is not alleging that the statute deprives the defendant itself of the Fourteenth Amendment Equal Protection. E.g. *Ducharme v. Putman, supra.* Instead, defendant challenges the effect of the state exemption of police officers from its residency requirement as a denial of the equal protection rights of its non-exempt officers and employees. This raises a *jus tertii* or third party standing issue.

Ordinarily, one cannot obtain standing to vindicate the constitutional rights of a third party. *Barrows v. Jackson, 346 U.S. 249, 255 (1953).* This rule is not a constitutional limitation to standing to assert federal constitutional claims. *Craig v. Boren, 429 U.S. 190, 193 (1976).* Instead, it is a self-imposed restraint used by the courts to insure that the people asserting constitutional claims are the best suited to vindicate those claims. *Ibid.* When examining a claim for standing to assert the constitutional rights of a third party, the United States Supreme Court has generally looked for a number of "considerations". The court always requires injury in fact to the litigant asserting the claim stemming from the constitutional deprivation. *Id. at 194.* In addition to injury in fact, the court has looked for a substantial relationship between the litigant and the third party whose claim he seeks to assert, the inability of the third party to assert his own constitutional claim and the dilution of the third party's constitutional rights if the *jus tertii* claim is not asserted. *Singleton v. Wulff, 428 U.S. 106 (1976), Eisenstadt v. Baird, 405 U.S. 438 (1972).* Note, *"Standing to Assert Constitutional Juse Tertii" 88 Harv. L. Rev. 423 (1974).* An examination of these considerations indicates that the defendant, Township of Winslow, has standing to contest the validity of *N.J.S.A. 40A:14-122.1* as a violation of the equal protection rights of its non-exempt officers and employees.

In order for any party to assert a federal constitutional claim he must initially show that the challenged statute causes him injury in fact. *Craig v. Boren, supra at 194. Singleton v. Wulff, supra at 115.* This does not necessarily mean that the litigant must show that he also suffers the alleged constitutional deprivation. For example, the claimant granted standing to attack a state statute setting the drinking age for males at 21 and for females at 18 on the ground that it deprived 18-20 year old males of equal protection in *Craig v. Boren* was a beer vendor. The beer vendor's allegation that she suffered economic injury as a result of the statute's application was sufficient to show that she was injured in fact. She did not have to allege that she was deprived of equal protection in order to raise the third party equal protection claim. In the instant case, the defendant, Township of Winslow, claims injury in fact from the challenged state statute's prohibition of the defendant's taking measures to better implement its law enforcement interests. These interests include the promotion of an identity with the community among its police officers and deterring crime in the township by the presence of off-duty police officers in the township. *Krzewinski v. Kugler, supra at 500.* While the defendant is able to protect its interests in having its other officers and employees required to be residents, the continued application of *N.J.S.A. 40A:14-122.1* prevents it from requiring plaintiff and other police officers to be residents when the need for a resident police force is more compelling than the need for other officers and employees to be residents. *Ibid.*

After showing that one is injured in fact by the application of the contested statute, the litigant seeking to assert *jus tertii* should show that his injury and the injury to the third parties whose rights he seeks to assert are substantially related. *Singleton v. Wulff, supra at 114-115.* In the case before this court, the defendant township's inability to uniformly require all of its officers and employees to be residents of the township directly affects the equal protection rights of the officers and employees subject to the residency requirement. The equal protection rights of the non-exempt officers and employees are inextricably bound to the defendant's ability to contest the validity of the state statute exempting police officers from the residency requirements. The only redress for both the defendant township and its non-exempt employees is for the defendant to successfully challenge the validity of *N.J.S.A. 40A:14-122.1* which creates the exemption of police officers from the defendant's residency ordinance.

Another important consideration in determining the propriety of a litigant's assertion of a third person's constitutional claim is the third person's inability to vindicate the constitutional claim himself. *Singleton v. Wulff, supra at 115-116. Eisenstadt v. Baird, supra at 443-446. Barrows v. Jackson, supra at 257.* The statutory scheme at issue in the instant case creates a situation in which those adversely affected by the scheme have been unable to contest its validity. If a non-exempt township officer or employee attempted to attack the validity of the residency ordinance, he would only be allowed to challenge the validity of the ordinance as applied to him, not the exemption of police officers. In *Mandelbaum v. State Dept. of Civil Service, supra,* the Appellate Division of the Superior Court held that a plaintiff subject to a municipal residency requirement could not attack the validity of the exemptions for policemen and firemen. *Id.* at 324-325. The court stated that the exemption of police officers from the municipal residency requirement is not relevant to the issue of the validity of the residency ordinance as applied to the plaintiff. *Ibid.* In addition, there is also little motivation for an officer or employee subject to a residency ordinance to attack the exemption of police officers. If this plaintiff is indeed successful in challenging the exemption and has it stricken as unconstitutional, it would be a hollow victory because the residency ordinance as applied to that plaintiff would still be upheld. *Abraham v. Civ. Ser. Comm., supra, at 77* (concurring opinion). Therefore, the third party claimants whose rights are sought to be vindicated in the instant case would not be able to effectively assert their equal protecton claim on their own.

In addition, a police officer residing in the Township of Winslow could not effectively contest the validity of *N.J.S.A. 40A:14-122.1* on equal protection grounds because the statute provides him with the freedom to choose whether or not to live in the municipality. This police officer could not challenge under equal protection the validity of a statute providing all police officers with the option to live where they choose. *Cf. Smith v. Newark, 128 N.J. Super. 417, 320 A.2d. 212 (Law Div. 1974), rev'd on other grounds, 136 N.J. Super. 107, 344 A.2d. 782 (App. Div. 1975).*[3] No equal protection

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3. In *Smith v. Newark, supra,* plaintiff resident firemen attacked the validity of *N.J.S.A. 40:14-9.1* exempting firemen from municipal residency requirements on the grounds that it was special legislation and that it impaired the obligation of contracts. The Law Division Court upheld the validity of the statute. The court was not presented with the equal protection issue being decided by this court today.

issue would be raised because the statute provides all police officers with the same option to live where they choose.

Since both exempt and non-exempt officers and employees will be unable to effectively raise the claim raised by the defendant in this case, the defendant should be given the opportunity to raise the consitutional challenge to *N.J.S.A. 40A:122.1*. Also, the Township's position is unique from that of the officers and employees in that the statute is a direct limitation on the defendant's power. Under *N.J.S.A. 40A:9-1.3* and *N.J.S.A. 40A:14-122.1*, the defendant is allowed to enact a residency ordinance but is barred from applying that ordinance to its police force. The defendant is directly constrained under these two statutes to treat police officers differently than most other officers and employees, thereby indirectly affecting the equal protection rights of the non-exempt officers and employees. Since the Township is the only party directly affected by the statutory scheme and its employees are unable to effectively vindicate their constitutional rights, the Township is in effect the only claimant able to effectively assert the claims presented. If the court denies the defendant the opportunity to raise this constitutional attack, it would most likely insulate the contested provision from attack and permanently dilute the equal protection rights of the non-exempt municipal employees, Note, "Standing to Assert Constitutional Jus Tertii", *supra*.

CONSTITUTIONALITY OF *N.J.S.A. 40A:14-122.1*

The rationale of the legislature for requiring all officers and employees of a municipality to be residents of the municipality while exempting police officers and firemen has been questioned by the New Jersey Courts. *Abrahams v. Civ. Serv. comm., supra at 76-77* (concurring opinion). *Id. at 88* (dissenting opinion). *Mandelbaum v. Dept. Civ. Serv., supra at 364-325. Trainor v. Newark, supra at 47 (App. Div.)*. However, the courts have not been directly presented with the issue of the validity of *N.J.S.A. 40A:14-122.1* under the equal protection clause. Today the equal protection issue is properly before the court and ready for dispositon. *N.J.S.A. 40A:12-122.1* is violative of the equal protection clause set forth in the Fourteenth Amendment of our Federal Constitution. The enactment of the statute created an irrational classification by exempting police officers from the general requirement that municipal officers and employees be residents of the municipality for which they work.

The Equal Protection clause requires state legislation to treat all persons within a class in a similar manner, and, if legislation has a discriminatory effect on a particular class there must be a rational basis for the disparate treatment. *Dandridge v. Williams, 397 U.S. 471 (1970). McGowan v. Maryland, 366 U.S. 420 (1961).* The classifications created by the relevant statutory provisions in the instant case are municipal officers, employees generally and police officers. The equal protection issue presented is whether there is a rational basis for the legislative classifications enabling a municipality to require residency as a condition of employment for officers and employees generally while denying a municipality the ability to impose the same residency requirement on police officers. No rational basis has been submitted or suggested by plaintiff. The exercise of whatever esemplastic powers or creative ability the court may have has failed to find a rational basis for this disparity in treatment.

Classifications created by the legislature carry a rebuttable presumption of reasonableness. *Dandridge v . Williams, supra.* Legislative enactments are presumed to be valid and the burden of the proponent of showing invalidity is a heavy one. *Hutton Park Gardens v. West Orange Town Council, 68 N.J. 843, 564-565 (1975).* The challenger must demonstrate that the classification lacks a rational basis in relation to the object of the legislation. *Velmohos v. Maren Engineering Corp., 88 N.J. 282, 295 (1980).* The classification of police officers as a group separate from other municipal officers and employees for the purpose of subjecting police officers alone to a residency requirement would almost certainly be valid. For example, in *Krzewinski v. Kuglec, supra,* the United States District Court for the District of New Jersey upheld the constitutionality of a tenure statute applying only to police officers and firemen under a compelling state interest analysis. The statute involved in that case required residence within the municipality as a condition of continued employment and tenure.[4] The court found that the residency requirement must be necessary to attain a compelling state interest in order

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4. *N.J.S.A. 40:47-5* provided in part that:

> The officers and men employed in every municipal police department and in every municipal paid fire department . . . shall severally hold their respective offices and continue in their respective employment during good behavior, efficiency and residence in the municipality wherein they are respectively employed.

to justify its effect on the officers' constitutional right to travel. *Id. at 498.*

The court upheld the residency requirement under this strict scrutiny test because it was necessary to attain the compelling state interests in promoting identity with the community among police, the deterrent effect on crime of having off duty police officers in the community and the association of police officers with people in the community in order to create a more knowledgeable and qualified police force. *Id. at 500.* While this classification is clearly valid, the instant case involves what is in effect the opposite classification. Instead of requiring police officers to be residents for certain purposes, the challenged statute exempts them from all residency requirements.

The ability of the state and its municipalities to require all of its officers and employees, including police officers, to be residents of the municipality is also unquestioned. *McCarthy v. Philadelphia Civ. Serv. Comm., 424 U.S. 645 (1976). Detroit Police Officers Assoc. v. Detroit, 405 U.S. 950 (1972)* (appeal dismissed for want of federal question). *Kennedy v. Newark, supra.* Our Supreme Court has held that general residency ordinances are valid because they can provide an incentive for better performance. *Id. at 183-184.* The court affirmed this reasoning in *Abrahams v. Civ. Serv. Comm., 65 N.J. 61 at 73*, against a challenge based upon an employee's assertion that the residency ordinance violated his constitutional right to travel. The Court reasoned that a bona fide residency requirement as opposed to a durational residency requirement did not infringe upon an employee's right to travel. *See, Memorial Hospital v. Maricopa County, 415 U.S. 250, 245-255(1974).* Based upon this reasoning, the court held that the validity of residency requirements should continue to be examined and upheld under the rational basis test rather than be subjected to the compelling state interest test when analyzed under the Fourteenth Amendment Equal Protection clause. The court, relying upon the reasoning of tthe California Supreme Court in *Ector v. Torrance, 10 Cal.3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (Sup. Ct. 1973), cert. den., 415 U.S. 935 (1974),* also noted some of the legitimate bases for the legislature to constitutionally impose a residency requirement on municipal officers and employees. Some of the legitimate purposes include the promotion of ethnic balance in the community, reduction of high unemployment rates among residents, improvements of relations between residents, improvement of relations between residents and officers and employees,

enhancement of the quality of employee performance by a feeling of personal stake in the municipality's progress and the general economic benefits flowing from local expenditure of employee's salaries. *Id. 10 Cal.3d at 135, 514 P.2d at 436, 109 Cal. Rptr. at 852, cited in Abrahams v. Civ. Ser. Comm., supra at 72.* Finally, our Supreme Court pointed out that the above policy justifications for the residency ordinance outweigh any adverse impact the residency requirement might have on the officers or employees. *Abrahams v. Civ. Ser. Comm., supra at 73.*

As noted above, residency requirements applying solely to police officers or to all municipal officers and employees are clearly consitutional. As previously mentioned, the rationality of state statutes exempting only police officers from municipal residency ordinances has been questioned by our courts. Although our courts have not had the opportunity to address this issue directly, a brief survey of their impressions of this statutory scheme is instructive.

In *Abrahams v. Civ. Serv. Comm., supra,* plaintiff, a city law department secretary, contested the validity of a municipal residency ordinance. Our Supreme Court upheld the validity of the ordinance without having to address the issue of the validity of the state exemption of police officers from its application. That issue did not have to be resolved because a finding by the court that the exemption for police officers was unconstitutional would have no impact upon the validity of the municipal ordinance requiring the plaintiff secretary to reside within the municipality as a condition of her employment. However, Justice Clifford, in his concurring opinion provides an insightful obervation concerning the interaction between the municipal residency ordinance and the state statutes exempting police officers and firemen from their requirements. He states that:

> It might very well be argued that the pattern of discrimination which emerges from that broader view of the case would be most difficult to sustain under a rational basis test and certainly under a compelling state interest test. Some peculiar combinations come to mind: school teachers, legal secretaries, sanitation men and physicians must live in the city while auditors, policemen and firemen need not. *Id. at 76-77* (concurring opinion)

Even though these comments were not part of the court's holding in the case, they are nevertheless instructive in deciding the issue presented in the instant case.

A Chancery Division Court held that a municipal residency ordinance exempting policemen and firemen unconstitutional as violative of the equal protecton rights of the non-exempt plaintiff employees. *Trainor v. Newark, supra, (Ch. Div.)* The Appellate Division subsequently reversed the Chancery Court, but not on the basis that the Chancery Court's equal protection analysis was in error. *Trainor v. Newark, supra, (App. Div.)* Instead, it reversed the lower court on the basis that it erroneously found that the challenged municipal ordinance exempted policemen and firemen when in fact state statutes exempted these officers from the municipal residency requirements. The Appellate Division emphasized that:

> While there may be doubt as to the rational basis for the validity of the two mentioned statutes, this case was not tried under that theory and those directly affected are not parties to this action. *Id. 145 N.J. Super. at 477.*

Of course, the instant case is tried under that theory and an exempted police officer is a party to the action. Another Appellate Division panel examined the Chancery Court decision in *Trainor v. Newark, supra,* prior to its reversal described above and overruled the Chancery Court decision. *Mandelbaum v. Dept. Civ. Serv., supra.* The Appellate Division overruled the Chancery Court only to an extent that it allowed a plaintiff employee subject to the local residency requirement to challenge the validity of the exemptions for policemen and firemen. *Id.* The court noted that the exemptions for policemen and firemen could very well offend the equal protection clause but held that this invalidity does not affect the validity of a municipal residency ordinance as applied to non-exempt employees. *Id. at 324-325.*

It is evident from this brief review of court decisions that the present statutory scheme is difficult to effectively present to the courts for examination and also difficult to justify as not being violative of the Fourteenth Amendment Equal Protection clause.

As noted earlier, the issue of the constitutionality of *N.J.S.A. 40A:14-122.1* has been effectively presented to the court. Using the

previous pronouncements of the courts as a guide, I will apply the appropriate equal protection analysis. The proper standard for testing the constitutionality of residency requirements and the exemptions provided by the state legislature is the rational basis test. *Abrahams v. Civ. Serv. Comm., supra.* While the United States District Court of the District of New Jersey applied a compelling state interest analysis in upholding a residency requirement for police officers and firemen, *Krzewinski v. Kugler, supra,* the New Jersey Supreme Court has clearly rejected the applicability of this test in the context of examining bona fide residency requirements. *Abrahams v. Civ. Serv. Comm., supra at 71.* The court stated that:

> The undeniable general right of people to live near but outside the boundaries of a city in whose government they aspire to be employed is, realistically, not equatable with the right to travel throughout the land vouchsafed by the federal constitution to all United States citizens, nor even, sensibly conceived, with the right to travel at all, but rather, as bluntly stated in *Kennedy,* merely the common right to live where one will ... The "right" involved is subordinate to a rational municipal policy to restrict employment to residents. *Id. at 71-71* (citations omitted)

Since legislation requiring residency as a condition of employment by a municipality need only meet a rational basis test, it follows that exemptions from this requirement granted by the state legislature need only meet the same test.

The State of New Jersey and its municipalities have consistently defended their residency requirements as implementing the policies of promoting employment of residents and the enhancement of the quality of employee performance through greater personal knowledge of the locality's conditions and the promotion of a feeeling of personal stake in the locality's progress. *Abrahams, supra at 72.* Municipalities have traditionally been required or encouraged to promote these interests through state enabling legislation such as *N.J.S.A. 40A:9-1.3* and its predecessors. The above consideratons which justify the general residency requirements imposed by municipalities under state enabling legislation are also applicable to residency requirements for police officers. In fact, until the enactment of *N.J.S.A. 40A:14-122.1* in 1972, police officers were treated the same as other

officers for purposes of residency requirements. *Mercandante v. Patterson, supra at 38* (held that police officers are "officers" under *N.J.S.A. 40:11-1 and N.J.S.A. 40:46-14* requiring municipal officers be residents of their municipality). The purposes asserted for the change in policy exempting police officers from municipality residency requirements are that the prior laws were becoming increasingly difficult to enforce and they made recruitment of new employees more difficult. *Trainor, supra at 475.* Other reasons asserted in support of the exemption of police officers are that the prior residency requirements often created personal hardships for the officers in finding and maintaining housing, etc. These assertions of hardship do not justify treating police officers differently because the other officers are also subject to the same hardships with regard to the problems of recruitment and enforcement. *N.J.S.A. 40A:9-1.3*, enacted in 1978, gives the municipalities the option to enact residency ordinances for application to their officers and employees. As an enabling type statute, it gives those municipalities which may encounter recruitment problems in obtaining officers and employees the option of not enacting a residency ordinance. This means that *N.J.S.A. 40A:14-122.1* is no longer necessary to serve this purpose with regard to the hiring of police officers. The only effect this statute now has is to prevent a municipality in the defendant's position from choosing to promote its interests by recruiting solely from its own geographical boundries. These interests noted above which are promoted by the municipality's residency ordinance are even more compelling when applied to police officers. *Abrahams, supra at 76-77* (concurring opinion). The present statutory scheme frustrates the implementation of the purposes asserted for its existence and for this reason it is not a rational means by which the state can achieve its asserted goals. Therefore, the classification created by*N.J.S.A. 40A:122.1* is not rational for purposes of the Equal Protection clause and, therefore, is unconstitutional.

The present statutory scheme frustrates the implementation of the purposes asserted for its existence and for this reason it is not a rational means by which the state can achieve its asserted goals. Therefore, the classification created by *N.J.S.A. 40A:122.1* is not rational for purposes of the Equal Protection clause and, therefore, is unconstitutional.

Since the court has found *N.J.S.A 40A:14-122.1* unconstitutional under the lesser standard of scrutiny, it need not examine the classification under a more stringent standard because the statute would obviously be constitutionally infirm. *Wiesenfeld v. Sec. of Health, Educ. and Welfare, 367 F.Supp. 981 (D.N.J. 1973), aff'd, Weinberger v. Weisenfeld, 420 U.S. 636 (1974).*

CONCLUSION

N.J.S.A. 40A:14-122.1 is unconstitutional for all of the reasons heretofore expressed. Therefore, the defendant's motion for summary judgment is granted and thereby, as a matter of law, defeats the plaintiff's claim.

APPENDIX B

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2467-82T2

RONALD BOOTH,

Plaintiff-Appellant,

v.

TOWNSHIP OF WINSLOW, a Municipal Corporation, GARY F. STOWELL, SR., Chief of Police, Township of Winslow, DOMINIC MAIESE, Mayor and Public Director, Township of Winslow,

Defendants-Respondents,

and

STATE OF NEW JERSEY,

Respondent.

Argued February 28, 1984 - Decided March 15, 1984

Before Judges Botter, Pressler and O'Brien.

On appeal from the Superior Court, Law Division, Camden County.

Thomas F. McGuire argued the cause for appellant.

Benjamin Goldstein argued the cause for defendants-respondents Township of Winslow, et al. (Maressa, Goldstein, Birsner & Patterson, attorneys).

Mark J. Fleming, Deputy Attorney General, argued the cause for respondent State of New Jersey (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel). Michael A. Pane argued the cause for *amicus curiae* New Jersey Institute of Municipal Attorneys (William J. Caldwell, on the letter brief).

The opinion of the court was delivered by
PRESSLER, J.A.D.

This is an appeal from a summary judgment entered by the Law Division declaring *N.J.S.A. 40A:14-122.1* unconstitutional. That statute prohibits a municipality from requiring police officers to reside within the municipality as a condition of employment. We reverse.

Plaintiff Ronald Booth was first employed as a police officer by defendant Township of Winslow in 1975. He did not then reside in the Township and has never since resided there except for a six-month period in 1979. In 1977 the Township adopted an ordinance requiring all municipal employees to reside in the municipality, affording those who did not a two-year period in which to become bona fide residents.

Plaintiff's employment was terminated by the Township in 1980 because of his non-compliance with the residency ordinance. Plaintiff, contending that the municipal residency requirement violated the preemptive provisions of *N.J.S.A. 40A:4-122.1*, brought this action seeking reinstatement and back pay. The Township asserted that the statute was unconstitutional on equal protection grounds because it was based on an irrational classification. It therefore contended that its ordinance was valid and enforceable, and it sought summary judgment so declaring.

Before dealing with the constitutional issue, we note that plaintiff has raised a threshold issue respecting the Township's standing to challenge the constitutionality of *N.J.S.A. 40A:14-122.1*. We agree that ordinarily a municipality, as a creature of the state, itself "has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Williams v. Mayor, 289 U.S. 36, 40, 53 S.Ct. 431, 77 L.Ed. 1015 (1933).* And see *Jersey City Redevelopment Agency v. Kugler, 111 N.J.Super. 50, 55 (App. Div. 1970), aff'd 58 N.J. 374, 377 (1971); Borough of Glassboro v. Byrne, 141 N.J.Super. 19, 23 (App. Div. 1976), certif. den. 71 N.J. 518 (1976).* The Township, however, urges, and the trial judge agreed, that standing should be accorded here because the Township is not seeking to protect its own constitutional rights but rather those of its other employees. It also argues that while it may not have standing to initiate a constitutional attack, it may do so defensively. We are satisfied that the standing question is at least debatable, and, as we concluded in *Jersey City Redevelopment Agency v. Kugler, supra,* "rather than debate the question * * * we deem it preferable in the public interest to settle the constitutional questions presented on their merits."

Having considered the legislative history of *N.J.S.A. 40A:14:122.1* as well as subsequent legislative enactments addressing the question of municipal residency, we are satisfied that the challenged statute constitutes a valid exercise of legislative power.

N.J.S.A. 40A:14-9.1, enacted in 1972, provides that

> No municipality shall pass any ordinance, resolution, rule, regulation, order or directive, making residency therein a condition of employment for the purpose of original appointment, continued employment, promotion, or for any other purpose for any member of a police department and force and any such ordinance, resolution, rule, regulation, order or directive in existence on the effective date of this act or passed hereafter shall be void and have no force or effect.

N.J.S.A. 40A:14-9.1, simultaneously adopted, similarly provides in respect of fire fighters. The 1972 statute constituted a significant reversal of long-standing legislative policy requiring police officers to reside in the municipality which employed them as a condition both of initial appointment and continued service. See *N.J.S.A. 40:47-3 and 5*, repealed in 1971 by *N.J.S.A. 40A:14-176* and readopted, respectively, as *N.J.S.A. 40A:14-122 and 128.* And see, generally, *Kennedy v. City of Newark, 29 N.J. 178 (1959); Mercadante v. The City of Paterson, 111 N.J.Super. 35 (Ch. Div. 1970), aff'd o.b. 58 N.J. 112 (1971). Krzewinski v. Kugler, 338 F.Supp. 492 (D.N.J. 1972). Cf. Abrahams v. Civ. Serv. Comm., 65 N.J. 61 (1974).* The Legislature explained this reversal of policy in the Statement of the Senate Judiciary Committee which accompanied the proposed legislation. That statement referred to the difficulty many municipalities were facing in recruiting police and fire fighters because of the existing residency requirement and expressed the desirability of having a uniform solution to this problem on a state-wide basis. The 1972 legislation, while eliminating the residency requirement did, however, create a preference for a resident seeking either appointment or promotion who achieved the same score as a non-resident on a civil service or merit examination. See *N.J.S.A. 40A:14-122.3* (repealed) and *122.4.*

The virtual abandonment of residency requirements effected by *N.J.S.A. 40A:14-122.1* was apparently perceived by some

municipalities as counterproductive to the public interest in securing a responsive local police force. Accordingly, in 1976 the Legislature adopted *N.J.S.A. 40A:14-123.1a*, which authorized municipalities to establish preference classes for initial appointment to the police force and permitted them to exhaust the class of local residents before appointing non-residents. *In Re Leary, 91 N.J. 151, 155 (1982)*, stated the purpose of the 1976 statute as follows:

> Evidently regarding the limited preference for appointment of residents afforded by the 1972 act as inadequately accommodating the legitimate concerns of the appointing municipality, the Legislature substantially expanded the scope of that preference by its 1976 adoption of *N.J.S.A. 40A:14-123.1a*, the statute here in controversy. The general plan of the statute is to eliminate any promotional preferences based on residency but to permit municipalities to classify applicants' initial appointment to police officer positions into four preference classes and to make its appointments from among the eligible candidates of each higher preference class before having to consider the eligible candidates within the next lower preference class. The classes, in order of preference, are municipal residents, other residents of the county, other residents of the State, and all others.

And see the Statement accompanying the 1976 statute, which made clear that its intention was to permit a more substantial preference for local residents on initial appointments. See *Gallagher v. Irvington, 190 N.J. Super. 394, 399 (App. Div. 1983)*. As in the case of the 1972 legislation, the 1976 legislation applied to fire fighters as well as to police officers. See *N.J.S.A. 40A:14-10.1a.*

The final piece of relevant legislation is *N.J.S.A. 40A:9-1.3*, adopted in 1978, which accorded municipalities the authority to require all their officers and employees to be bona fide residents therein "unless otherwise provided by law." It is clear, therefore, that if the present legislative scheme respecting police officers as set forth in *N.J.S.A 40A:14-122.1 and 123.1a* is constitutionally valid, those municipal employees are not included within the ambit of the general provisions of *N.J.S.A. 40A:9-1.3.*

As a fundamental principle of constitutional law, the present legislative scheme must be sustained if the classification on which the disparate treatment is based is *rationally related to a legitimate governmental objective.* See *Abrahams v. Civ. Serv. Comm., supra, 65 N.J. at 71.* We are satisfied, contrary to the conclusion of the trial court, that the classification attacked here meets the rational-relation standard.1

To begin with, we are of the view that the trial judge failed to appreciate the importance of *N.J.S.A. 40A:14-123.1a,* although it constitutes an integral and significant component of the overall police residency scheme. The import of that statute is to minimize the degree of disparity in the treatment of the distinct classes of municipal employees by permitting municipalities to give preferential treatment to qualified residents in making appointments to their police and firefighting departments. To that extent, the overall legislative plan permits municipalities to achieve the benefits of a residential connection between police officers and the municipalities they serve without precluding recruitment of officers from a larger pool.

More significant, however, is the presumptive rationality of a class of municipal employees consisting only of police officers and fire fighters. See *Trainor v. City of Newark, 145 N.J.Super. 466, 474 (App. Div. 1976).* In dealing with that class, the Legislature has recognized that the ultimate goal of affording the public the benefit of the best possible municipal police and fire-fighting forces is affected by conflicting considerations. Thus the municipal ability to recruit the best available applicants may be severly constrained by a residency requirement, and obtaining the benefits of local residency may well result in a compromise in the quality of appointments resulting from a constricted recruitment pool. These are difficult conflicts to resolve. The Legislature has opted to resolve them by a uniform scheme, applicable on a state-wide basis, which permits municipalities to require residency as a condition of appointment so long as qualified resident-applicants are available but not as a condition of continued service or promotion. It is not for us to question

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1. We note the applicability of the traditional equal protection test rather than the "compelling state interest" test since the classification here is not "suspect" in the constitutional sense and since no fundamental rights are abridged by the challenged legislation.

the wisdom of that scheme or to evaluate it against other alternatives. Our sole task is to determine whether it constitutes a rational response, based on a rational classification, to a governmental problem. We are persuaded that it patently meets this test.

Reversed and remanded for further proceedings consistent with this opinion.

APPENDIX C

SUPREME COURT OF NEW JERSEY
C-970 SEPTEMBER TERM 1983
22,538

ON PETITION FOR CERTIFICATION

RONALD BOOTH,
Plaintiff-Respondent,
vs.
TOWNSHIP OF WINSLOW, etc., et al,
Defendants-Petitioners,
and
STATE OF NEW JERSEY,
Respondent.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2467-82T2 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs; and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to *R. 2:12-9.*

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 2nd day of July, 1984.

Clerk

Stephen W. Townsend

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY - LAW DIVISION
DOCKET NO. L-68096-79

RONALD BOOTH,
Plaintiff

vs.

TOWNSHIP OF WINSLOW, a Municipal Corporation; GARY F. STOWELL, SR., as Chief of Police of Township of Winslow; and DOMINIC MAIESE, as Mayor and Director of Public Safety of Township of Winslow,
Defendants

STENOGRAPHIC TRANSCRIPT OF MOTION

Date: June 1, 1982
Place: Camden County Courthouse
Camden, New Jersey

B E F O R E:

THE HONORABLE THEODORE Z. DAVIS, J.S.C.

A P P E A R A N C E S:

THOMAS F. McGUIRE, ESQ.
Attorney for the Plaintiff

MARESSA, GOLDSTEIN, BIRSNER & PATTERSON
BY: BENJAMIN GOLDSTEIN, ESQ.
Attorney for the Defendants

Patricia Hissem, C.S.R.
Room 602 Courthouse
Camden, New Jersey

THE COURT: All right, this is the matter of Booth vs. the Township of Winslow, et als. Counsel can enter their appearance on the record.

The matter is called for trial; but as I understand it, there is a motion scheduled for this Friday. And it's been requested that I decide the motion today preparatory to trial.

The Attorney General has been served notice. Of course, he had not entered -- he or she has not entered his or her appearance. But we shall proceed with argument on the motion. Of course, I'll give counsel the right to reargue or submit supplemental briefs if they feel that it is necessary.

But enter your appearance at this time.

MR. GOLDSTEIN: Yes, Your Honor, Ben Goldstein from the office of Maressa, Goldstein, Birsner and Patterson, representing the defendants in this matter.

MR. McGUIRE: Thomas F. McGuire for the plaintiff.

THE COURT: You may proceed.

MR. GOLDSTEIN: Thank you, Judge.

Judge, primarily, the plaintiffs' claim in this case is based upon New Jersey Statute 40A:14-122.1. This is a statute which purports to prohibit a municipality from passing a residency requirement for a police officer.

Mr. Booth it's undisputed was a police officer in the town. The town passed a residency ordinance. And Mr. Booth was discharged because of his failure to comply with the residency ordinance.

It is therefore our position that the statute is unconstitutional as denying equal protection and special legislation; and that absent that statute, of course, the plaintiff would not have a valid claim.

The cases are legion in many many states, including New Jersey and including the Supreme Court of the United States, holding that residency ordinances such as Winslow Township's is valid exercise of police power, and is Constitutional and does not deny equal protection. And it's also valid under the Constitutional right to travel and freedom to move and live where one chooses. The cases have always upheld such residency ordinances.

However, of course these are in states which did not have a residence exemption for police officers such as New Jersey has.

Now, my brief basically gives Your Honor the background of the statutory enactments and when they were passed, and then goes into prior New Jersey Court decisions, including a decision from the Supreme Court of New Jersey that has questioned the validity of the statute, has indicated that the statute is potentially unconstitutional as a violation of equal protection.

However, all cases my research discloses -- disclosed have decided the cases on other issues. So that, as far as I can determine, the statute is still in force and effect, has not been declared unconstitutional, and of course is entitled to a certain presumption of Constitutionality, unless and until Your Honor should rule otherwise.

Basically, Judge, I think the statute on its face purports to exempt police officers from general residency requirements. And there is an additional statute in the State of New Jersey, 40A:14-9.1 et seq., which basically says a municipality may pass a residency ordinance for anyone. If a municipality may pass a residency ordinance for anyone, however policemen are exempt by the other statute, clearly this is a piece of special legislation; and that doesn't necessarily mean that it would violate the equal protection clause.

However, it would be valid providing the State could show that there were -- or in this case, the plaintiff could show that there was either a rational basis for the exemption or a compelling State interest in the exemption.

And I don't want to burden Your Honor with my citation of cases; they're all contained in my brief. But basically, the argument boils down to the fact that if many many Courts, including the Supreme Court of the State of New Jersey and the Supreme Court of the United States, have found both a rational basis and a compelling State interest in favor of residency requirements, which they have over and over again, there can hardly be a rational basis for a compelling State interest against or for an exemption for police officers; particularly in light of the McCarthy decision, which is cited in my brief, United States Supreme Court decision which indicates and goes through the reasons why it is -- there is a compelling State interest in having police officers who are residents of the community.

Their proximity in cases of emergency is probably the primary

reason; the fact that they become friendly with people in the town, thus making it more easy for them to do their job. They're familiar with the town; they know what's going on there. And they're the people that are to uphold and enforce the laws in the town.

Therefore --

THE COURT: You said the McCarthy decision is in your brief?

MR. GOLDSTEIN: Yes, Judge, it's cited a couple times, one time I see it right here on page 10. I'll give you the citation; it's at --

THE COURT: Well, I don't need the cite, but just find the page.

MR. GOLDSTEIN: On page 10, there's one place where I've --

THE COURT: I see it.

MR. GOLDSTEIN: -- cited it in the middle paragraph.

And therefore, really our position on that is really just that simple. It's very difficult for me to conceive of a rational basis and compelling State interest to have a police officer who's a resident, and now say that there's a rational basis for a compelling State interest in exempting police officers as the only exemptions from the residency requirement.

Now, Mr. -- my adversary's brief, Mr. McGuire's brief in opposition to this motion basically raises the issue that the Township is not the proper party to have standing in this case.

And Judge, I have prepared -- as I indicated before, this motion was originally scheduled to be heard on Friday. Under the rules, I would have until tomorrow to deliver the brief to you. But I don't have it prepared. It was typed this morning; and it would have been hand-delivered tomorrow.

I do have my rough draft here. And basically, I would like to bring to the Court's attention one case, the case of Kenney, K-E-N-N-E-Y, vs. East Brunswick Township. That's reported at 172 N.J. Super. 45. The Atlantic cite is 410 A.2nd 713. It's an Appellate Division 1980 case.

And in that case, there was a statute which provided that employees in first and second class counties would receive benefits which were denied to other employees of that county. And the Appellate Division said that the Township was a proper party to assert the invalidity of that statute, since it was a discriminatory statute and since

the Township was being asked to carry out what therefore became a discriminatory policy.

I think that case lays the standing issue to rest here; because the Township is being called upon then to carry out a discriminatory policy. And it may be subjected to liability from other employees. After all, Mr. Booth brings this action, saying that we enforced our residency ordinance in the faith of the State statute. Other police officers could bring action against us, saying that we failed to enforce our residency ordinance in the face of their compliance. I think the Township would be in a difficult position if it made its 25 or 26 police officers move into the town, and then said to Mr. Booth, Well, you don't have to, you don't have to move in because you're attacking the validity of the ordinance.

The Township is sort of in the middle. I think clearly it's a proper party to raise the issue here.

And outside of that, unless the Court has any specific questions, I would stand on the brief that I've submitted.

THE COURT: Mr. McGuire.

MR. McGUIRE: Thank you. Your Honor, on February 15, 1972, the legislature of the State of New Jersey clearly evidenced its intentions in regard to police officers and municipalities. And I would like to read that, Your Honor.

"No municipality shall pass any ordinance, resolution, rule, regulation, order, or directive making residency therein a condition of employment for the purposes of original appointment, continued employment, promotion, or for any other purposes, for any member of a police department and force; and any such ordinance, resolution, rule, regulation, order, or directive in existence on the effective date of this act or passed hereafter shall be void and have no force or effect."

February 15, 1972, the State of New Jersey promulgated this statute. So --

THE COURT: And it is presumptively valid and Constitutional. I think Counsel has admitted that.

MR McGUIRE: Correct, Your Honor. And then, in 19 -- on September 28, 1977, the Township of Winslow adopted this ordinance:

"All municipal officers and employees other than those exempt by statute, now in the employ or hereafter to be employed by the Township of Winslow are hereby required as a condition of their continued employment to have a place of abode in the Township of Winslow and to be bona fide residents therein."

So, we have a State statute which says officers are exempt from living in the town; it's been there since 1972. In 1978, they say that all the employees of the town except those exempt by statute are required to be residents of the town.

THE COURT: That was the ordinance.

MR. McGUIRE: That was the ordinance. Ron Booth worked as a police officer for this town since 1975. He had a good record. After they adopted this, they say, You got to leave the town. Why does he have to leave the town?

THE COURT: Have to leave the police force.

MR. McGUIRE: Yes.

THE COURT: Not the town.

MR. McGUIRE: But he didn't live in the town, that's right.

THE COURT: He'd have to come into the town and live.

MR. McGUIRE: That's right, You got to come in or you got to leave the police force.

This ordinance doesn't say what the Township contends that it says. It doesn't say that. It clearly says that those that are exempt by statute, this ordinance doesn't apply to.

And the chief of police, he singles a police officer out and says, This ordinance applies to you; and it doesn't.

The Township is straining and attempting to get a false interpretation foisted upon the Court. This ordinance specifically states that those that are exempt by law don't have to live in the town to continue employment.

And I'm surprised that the chief of police, looking at this -- and there's a State statute, still valid, presumed to be valid. Now, the town fathers in their wisdom didn't say, Well, we're going to attack this, this State statute, and we're going to put in here police officers have to live in the town as a condition of continued employment. They didn't say that. The town council says other than those exempt by statute.

Now, that's clear, absolutely clear. And an interpretation is trying to be foisted upon the Court to justify the firing of Ron Booth.

THE COURT: Well, don't we -- can't we say this: That they have an ordinance; the way it's drafted, it seems as if the plaintiff still has a right to his position because he's expected by statute, if we're going to rest upon the wording of the ordinance. Because the ordinance seems to be consistent with the statute, especially as you come under -- I guess it's 14-9.1, and so forth. And he falls within the exception. But notwithstanding that, they fired him.

MR. McGUIRE: That's correct.

THE COURT: So, the Township, regardless of how inarticulate the ordinance was drafted, they still feel that they have the power to fire him because he doesn't reside within the Township. Now, you're alleging that's a violation.

MR. McGUIRE: That, you know, that's completely arbitrary. There's no ordinance that says that they have a right to fire a police officer who doesn't live in the town. There's no ordinance to that effect.

THE COURT: Are you saying then that they're denied the right to challenge the Constitutionality of the State statute?

MR. McGUIRE: Now, they didn't do this by declaratory judgment, you know. This man was fired. If they want to attack the statute, you know, they're foisting this -- they're twisting this ordinance --

THE COURT: Can't they get interpretation of the statute? Because you're the one who filed the complaint which has brought it into issue. And can't they by way of defense now raise the Constitutionality of the act?

MR. McGUIRE: They told him that, There's a town ordinance which requires you to live in the town or get out as a police officer.

THE COURT: And your argument is that the ordinance does not require this.

MR. McGUIRE: It doesn't on that flimsy, phony basis, in my opinion. And I'm very respectful; and I don't mean to condemn the opposing attorney. But I think it's phony, what they're using to fire him with.

Now, if they want to attack this statute, there's a way to do it.

But they're saying, Well, you know, we're, we're just attacking one statute. What statute are they attacking? They're not attacking the fireman's statute; they're not attacking the statute which requires the town treasurer to live in the -- or that doesn't require the treasurer to live in the town. They're not attacking that; they're just attacking this.

THE COURT: They're attacking the 40 A:14-1 --

MR. McGUIRE: That's correct.

THE COURT: You're saying they can't attack it?

MR. McGUIRE: What I'm saying, Judge, is that a municipality is a department of the State. It's --

THE COURT: Yes.

MR. McGUIRE: It's created by the State. And the case of Trenton vs. State of New Jersey clearly states that they don't have any Constitutional issues in regard to the Fourteenth Amendment.

They're saying that because an office boy is required to live in the town, the State is applying the law unequally to him, if the office boy wants to continue working in town. Therefore, that's a denial of the Fourteenth Amendment.

I submit to His Honor in that case, that's not a denial of the Fourteenth Amendment to invalidate the statute as to the police officer. I think that upholds the statute as to the police officer. Because why should an office boy be required to live in the town?

THE COURT: Well, why don't we use that same argument: Why should a police officer be required to live within a municipality?

MR. McGUIRE: First of all, the ordinance doesn't require him to live in the municipality.

THE COURT: That's number one.

MR. McGUIRE: Number one.

THE COURT: So, let's assume we're buying that argument, for whatever reason.

MR. McGUIRE: All right, okay. Now, we're saying that a State statute requires that they live in the town; or are we saying that there's some fictional ordinance requiring him to live in the town?

THE COURT: You're saying that there's a State statute which gives the plaintiff a right to live anywhere he wants and still be employed by the municipality.

MR. McGUIRE: As a police officer.

THE COURT: That's right. That's the statute under which you're proceeding.

MR. McGUIRE: Yes.

THE COURT: Right.

MR. McGUIRE: And it's a valid statute, it's a valid statute, nothing wrong with that statute. If there's something wrong with a statute saying that a Township can require other municipal employees to live in the town, if there is a denial --

THE COURT: What's the rational basis for such -- I -- would you admit that this is special legislation?

MR. McGUIRE: No, of course not.

THE COURT: It's not special --

MR. McGUIRE: It's not special legislation.

THE COURT: If you were to compare it with 4:9 -- or 40 A:, I guess, 9-1, and also your 40 A:14-122, wouldn't it appear to be special legislation?

MR. McGUIRE: What it's saying is that if towns want to enact; and they're leaving it up to the discretion of the towns.

THE COURT: But they didn't --

MR. McGUIRE: If the towns want to require other employees to stay in the town, then they can; but we don't want to require police officers.

THE COURT: This statute specifically addressed itself to police officers.

MR. McGUIRE: That's correct.

THE COURT: My question is let's assume, then, since I won't get an admission -- I can understand that -- from you, that it is special legislation; what is the rational basis for this exception as it relates to police officers?

MR. McGUIRE: All right.

THE COURT: Why police officers --

MR. McGUIRE: Okay.

THE COURT: -- as a special class don't have to reside within a municipality? What is the rational basis for such legislation?

MR. McGUIRE: Well, for the reason a police officer is on duty technically 24 hours a day; and they're giving him some benefits.

THE COURT: So, you're saying the rational basis for allowing police officers to live outside the city or municipality is to give them some type of renumeration?

MR. McGUIRE: Or benefits.

THE COURT: Not necessarily assuming dollar amount, but --

MR. McGUIRE: A benefit.

THE COURT: And that is the basis you will say is one of the rational bases?

MR. McGUIRE: Well, there can be many bases; but this is the first one that comes to my mind.

THE COURT: What would be the compelling State interest for adopting such special legislation? All of which is -- are requirements for special legislation, there must be a compelling State interest.

MR. McGUIRE: Well, number one, being a police officer is a very dangerous job. They get shot.

THE COURT: Yes.

MR. McGUIRE: They get beat up; they get broken up.

THE COURT: So, how does that relate to residence?

MR. McGUIRE: And they're giving them a benefit for being exposed to that danger and being on call 24 hours a day.

THE COURT: How does that relate to residency, though?

MR. McGUIRE: Because --

THE COURT: It should have some relationship.

MR. McGUIRE: All right, sure. All right. The relationship is this: Number one -- well, let's do this particularly.

THE COURT: Right.

MR. McGUIRE: Ron Booth, 1975, was hired. He lived outside the town. He had a house with a wife; he had children. And then, in 1980, they fire him. Now, if I assume, being a practical man, if he could monetarily move into the town, he would do it. He would have to sell his house, buy another house at increased interest rates.

THE COURT: But you're talking --

MR. McGUIRE: It would be a financial strain on him to move into the town. And so, that's the benefit that police officers are getting for putting themselves up to be shot at times, or getting broken up at times.

THE COURT: Well, you're missing my point, I think. I'm not concerned with the equity or inequity of his situation. I'm going beyond that; and I'm going to the point where the legislation was enacted. What was the compelling State interest that caused the enactment of this particular statute?

MR. McGUIRE: Well, the --

THE COURT: Or the rational basis for taking a group of individuals and making them an exception, to wit --

MR. McGUIRE: All right.

THE COURT: -- the police officer to be. There must be a rational basis for it.

MR. McGUIRE: All right. A clamor by the municipalities to have office boys work in the town, and other, other employees.

THE COURT: Now, I'm trying to see a rational basis for excepting police officers.

MR. McGUIRE: Well, that's what I'm saying.

THE COURT: Not office boys.

MR. McGUIRE: That's what I'm trying to answer, Your Honor. The police officer is a different breed of cat.

THE COURT: What is so different whereby it would require the legislature to allow them to live out of the city? How do you connect that? What's the rational basis for that to residency?

MR. McGUIRE: Well, if --

THE COURT: It seems as if it would be the reverse.

MR. McGUIRE: All right. Number one, they want good officers; they want good officers. They want more people who are good to become good police officers. They want college trained officers at this time. And so, in order to attract them to take on this dangerous job, they are saying, You don't have to live in the town.

THE COURT: Now, have you researched the legislative history of this particular act to ascertain whether or not that was a point of consideration when they enacted this law, that there was a showing of some compelling need, or there was a lack of available police officers in the municipalities, therefore, the State would have to open up the residence requirements to solve this problem? Was that a part of the reasoning of the State --

MR. McGUIRE: Well, I'm --

THE COURT: -- to make this special --

MR. McGUIRE: I'm saying that on the face of it, I'm -- I don't know what the legislative history is. But I don't think we have to go into the legislative history; because I think it's very clear.

THE COURT: Oh, the statute is clear on its face.

MR. McGUIRE: It's very clear; and I think it's clear why, why they don't want police officers -- why they're saying they don't have to be a residents of the town in which they work as police officers.

THE COURT: There is no dispute that the language of the statute exempts police officers from having to reside within the geographical confines of any particular municipality. There's no dispute on that. The language is extremely clear.

The challenge to that act is by the municipality itself, as expressed by Counsel here, that under the equal protection clause and so forth, first of all, that there is no rational basis for this special legislation, special in the sense that is has carved out a group of individuals from the masses and have given them a right as opposed to some others. So, it's special in that particular sense.

But when you do that, there must be a compelling State interest, there must be; that's what Counsel is arguing. And there must be a rational basis for this type of legislation, rational in the sense it must relate to that which is being legislated, to wit, residency. How does allowing police officers to live outside of a municipality relate to the issue of residency?

For example, it is quite easy to see the reverse of it, as Counsel's argued, that they should be required to stay within the confines of a municipality for a lot of obvious reasons. That's already placed upon the record.

That way, you can see a rational basis for a law which would state that you must reside within; because your're on the 24-hour call; you can't live 40 miles away and really be effective for us, the municipality; you would have more of an interest in the municipality in which you live; and a host of other things which would show a rational basis.

Now, using that as examples, I'm just trying to say what is the rational basis for a law that says you don't have to live? In other words, give me the converse.

MR. McGUIRE: Well, let me, let me -- you know, we're talking about the rational basis of --

THE COURT: For the exemption.

MR. McGUIRE: -- of requiring to live in the town.

THE COURT: No, to live out of the town.

MR. McGUIRE: Well, His Honor, His Honor seems to think that, you know it -- there is rational basis for them requiring to live in the town. I don't think it's a rational basis.

For instance --

THE COURT: No, I was giving you examples of what --

MR. McGUIRE: Well, the examples, I -- Your Honor, I disagree with, very respectfully.

THE COURT: I wasn't giving it to you to agree or disagree. I was setting up a methodology of showing you how you establish rational basis. Whether you believe it or not, I'm not talking about that.

Do the same thing on the other side of the coin; show me a rational basis for the exclusion. It's not a matter of agreeing with what I say; but I'm just showing you how I can outline various reasons --

MR. McGUIRE: All right.

THE COURT: -- for keeping him in. Give me --

MR. McGUIRE: All right.

THE COURT: -- the reasons on the other side, one of which you said you haven't read the legislative history; but perhaps it allows -- it helps them by getting college graduates. But that doesn't necessarily follow, unless there's proof that there was an inability to get the personel that was necessary.

MR. McGUIRE: Well, you know, His Honor, His Honor says, Well, let me give you an example: A cop living in a town will have greater interest in the town; he'll know the people. That doesn't necessarily follow; that does not necessarily follow. You may get a cop who doesn't spend any of his extra time in the town. He may be, he may be 50 miles away fishing every opportunity he gets.

THE COURT: Oh, sure.

MR. McGUIRE: You know --

THE COURT: We're just speaking in terms of probability.

MR. McGUIRE: Or he may be out -- he may not even bother talking to his neighbors; or he may just talk to his neighbors.

THE COURT: All right.

MR. McGUIRE: But what I'm saying is this: A municipality is looking for the best candidates they can get. They're looking for people who will take their training, looking for people who will go to college while they're police officers and get their degree. And there's a rational basis, a few more people like that to expose themselves to this dangerous job and very emotional type job, a job that not very many people hold high in esteem today. If you want to get people like that, good people who will get their education, you got to go outside the municipality.

THE COURT: And search --

MR. McGUIRE: In many, in many many cases --

THE COURT: And search for them, you mean?

MR. McGUIRE: To give them the elective to live outside of the municipality.

THE COURT: Is the elective to give them a job if they want it? Isn't that what they're after, individuals who are well trained, but they would have to come into the municipality to perform their duties and live in the city?

MR. McGUIRE: It can be --

THE COURT: Or --

MR. McGUIRE: It can be a great financial sacrifice to move from one municipality to another, sell a house, and buy a house --

THE COURT: Yes.

MR. McGUIRE: -- at increased interest rates.

THE COURT: All right. Well, let me ask you this.

MR. McGUIRE: Sure.

THE COURT: Your -- I understand your position on the compelling State interest and a rational basis.

You stated in your brief basically that the Township did not have standing to attack the Constitutionality of this statute because the Township is a creature of the State, derives its power from the State; and once the legislature passes a law, the Township is without a remedy to challenge it in any regard. Now, assuming that's a fair characterization of your statement, how do you explain Kenney vs. -- what is it, East Brunswick?

MR. GOLDSTEIN: Yes, Your Honor.

MR. McGUIRE: I haven't seen Kenney vs. East Brunswick. But other cases that I have seen, namely the case of Trenton vs. State of New Jersey, which I referred to back in chambers with His Honor, it said that there was no Constitutional privilege of the state of Trenton to cry that the State is taking water rights from them without just compensation in violation of the Fourteenth Amendment.

THE COURT: Yes, but weren't -- were those waterways navigable streams?

MR. McGUIRE: I -- Your Honor, I don't -- I just don't recall. But we're speaking about, you know, the diminution of the water supply.

THE COURT: Yes, it's a State right. So, I think that case will be distinguishable anyway. If the current ebb flows, and so forth, it would be a State right --

MR. McGUIRE: Well, what they said --

THE COURT: -- not municipal right.

MR. McGUIRE: What they said was this, in that case, Your Honor:

That if they want to get rid of the city of Trenton, they can do it very easily; whereas, you know, all they have to do is pass legislation to that effect.

THE COURT: There's a special requirement.

MR. McGUIRE: And there's no, and there's no Constitutional right.

THE COURT: Yes, but there's a special requirement on dissolving a particular municipality, too, by law. But I don't think that answers the question.

That the State has the power to create, yes; and perhaps it has the power to destroy, yes. But I'm not mindful at this moment of any statutory denial of a right to a municipality to challenge a law that does not affect the creation or death of a municipality, but affects the operation of a municipality, which would deny them the right to properly administer that which has been given to them and challenge it in the courts.

Your argument is that even though -- your argument is, basically, the State can pass a law which relates to the administration of the municipality, can adversely impact upon that municipality, but that municipality cannot come into the courts of this state and challenge that particular act on Constitutional grounds. That's basically your argument.

Mr. McGUIRE: That's it, Your Honor.

THE COURT: All right. I understand what you're saying.

MR. McGUIRE: That's all I have, Your Honor.

MR. GOLDSTEIN: May I be heard again?

THE COURT: Yes.

MR. GOLDSTEIN: Judge, I just want to respond. And again, I'm not going to burden the Court with a quote on the record. However, I would ask to direct the Court's attention to -- there's a quote in my brief from the Eckler case.

THE COURT: What page?

MR. GOLDSTEIN: Page 9, Judge. And the Eckler case is a California case. But the language was cited with approval in both the New Jersey Supreme Court case of the Abrahams case and the

Chancery Division in Trainor which goes in and lists about eight or nine reasons why police officers should be residents in the town, the rational basis, and all that. As I say, I don't want to go into it. I just want to point it out to Your Honor.

Also, when we talk about there's a rational basis because we have to get people, perhaps, with a college education or beter qualified outside the town, I think that's the reason that the other statute was passed, 40 A:9.1, which allows the municipality to elect to adopt a residency ordinance or not. If Winslow Township has a lot of qualified people within their town, they can go ahead and adopt the residency ordinance. If Pennsauken does not have a lot of qualified people within their town, well then, they're free to go outside their town and not adopt a residency ordinance.

So, I don't think that you can talk about a statewide exemption statute as being based on the idea that a municipality has to go outside its town; because there's no basis for that. Municipalities generally don't have to go outside their town.

And finally, Judge -- Well, two more points. As far as the local ordinance saying that all municipal officers and employees other than those exempt by statute, I think it's a basis of statutory construction; that you have to read into that, Except those exempted by a valid statute. If the Winslow Township's position is that this exempting statute is not Constitutional, then clearly this ordinance does apply to Mr. Booth; and that's why we're here today.

If Your Honor rules that the statute is unconstitutional, the ordinance clearly applies to Mr. Booth. If Your Honor rules the statute is not unconstitutional, maybe the ordinance doesn't apply to Mr. Booth. At that point, I would have to concede that. It would be up to the Court to determine whether or not the State statute is valid; and that way, the residency ordinance written like this would not have to be rewritten.

I don't think a municipality would go out and pass an ordinance in the face of a State statute which came directly head to head with that State statute in the hopes of getting the State statute declared unconstitutional. I think more likely, at that point, there would be a whole plethora of challenges to the residency ordinance. So that, the Township simply chooses to do it in this fashion.

And finally, just on the issue of standing, I just want to point out

that the quotes in Mr. McGuire's brief, the quotes that he quotes from those cases the Trenton vs. New Jersey case, and the Jersey City vs. Martin, show without even reading the case, just show that these cases wouldn't apply in the specific situation.

First, in Trenton vs. New Jersey, on page 4 of his brief, the first sentence of that quote says, "The power of the State, unrestrained by the contract clause of the Fourteenth Amendment, over the rights and property of cities held and used for government purposes cannot be questioned."

And first of all, that obviously applies to the contract clause of the Fourteenth Amendment, not the due process clause of the Fourteenth Amendment.

THE COURT: And we're certainly not talking about property.

MR. GOLDSTEIN: Right, and we're certainly not talking about rights and property of the city.

And in the New Jersey vs. Martin case, there's a large quote on page 5. And I would point out in the middle of that quote, it reads, "In all these respects, the State is supreme; and its legislative body, conforming its actions to the State Constitution, may do as it will unrestrained by any provision of the Constitution of the United States."

And I would point out, Judge, that the State Constitution has an equal protection clause; and I point it out in my brief. So that, even if this case stands for the proposition, which I don't concede, but even if it did stand for the proposition that a state could do anything it wants to a municipality regardless of the Federal Constitution, I don't think this, in this context, meant to say that. But even if I accept that, it's still restrained even by the Court's own language, by the State Constitution, which has an equal protection clause.

And that's really all I would have to add at this point.

I will make Your Honor aware if I hear from the Attorney General or anyone of his office or deputies.

THE COURT: All right. Gentlemen, as we know, the Attorney General has not entered his appearance in this matter. He has been properly noticed pursuant to the rules of court. Where a statute of the State of New Jersey is being challenged, we have to notify the Attorney General. But for some reason, they have not entered an appearance.

The Court will decide the motion which is presently before it. And the motion will be, I guess, dispositive of the case if it is favorable to the Township. If not favorable to the Township, then it's just a matter of determining the amount of damages, if any, that Mr. Booth has suffered as the result of the activity of the Township.

The opinion will have to be -- I'll just have to give in writing to you. We'll just hold the trial in abeyance pending the receipt of the opinion.

The reply brief will probably be mailed to my chambers. I guess you'll get a copy of it, Mr. McGuire. And after I receive the reply brief, and assuming we don't hear from the Attorney General, then we can consider the arguments as closed, unless Mr. McGuire sees something in the reply brief where he would like to have an opportunity to respond. And if you do, you can have one week from the receipt of the reply brief within which to respond. At the expiration of that one week, then I'll go to work and come to a conclusion one way or the other.

I think it's an interesting issue. And as Counsel has stated, the Supreme Court has dodged the issue, I guess, on two occasions, one Appellate Court -- the Supreme Court, I guess, has dodged the issue. But you gentlemen have given it to me right between the eyes; I can't dodge. So, I will have to decide the issue.

And I guess it will -- depends on what the decision is. It could be both ways; no matter what I do, it will probably go up. So, I don't mind at all.

So, that will be --

MR. GOLDSTEIN: Why did you look at me when you say that?

THE COURT: No particular reason, really; you're closest.

But so, I'll wait to hear from you, gentlemen. If not, you'll be hearing from me. Thanks a lot.

MR. McGUIRE: Thanks very much, Your Honor.

MR. GOLDSTEIN: Judge, my reply brief is really in the nature of a letter brief; and it will be mailed today.

THE COURT: Okay.

* * *

CERTIFICATION

I, PATRICIA HISSEM, Certified Shorthand Reporter for the State of New Jersey, certify that the foregoing is a true and accurate transcript to the best of my knowledge and ability.

PATRICIA HISSEM
Certified Shorthand Reporter